

DEC 24 2003

**NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

THOMAS A. HIGHTOWER,

Petitioner - Appellant,

v.

PLILER, ET AL., Warden,

Respondent - Appellee.

No. 02-16932

D.C. No. CV-99-00517-LKK

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior Judge, Presiding

Argued and Submitted December 1, 2003
San Francisco, California

Before: SCHROEDER, Chief Judge, D. W. NELSON, and RYMER, Circuit Judges.

Thomas A. Hightower appeals the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254. He challenges his California conviction after he entered a nolo contendere plea to a charge of committing a lewd and lascivious act upon a child. We affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The district court did not err in failing to hold an evidentiary hearing on whether Hightower was competent to enter a nolo contendere plea. Hightower was not entitled to an evidentiary hearing because he did not allege facts that would, if proved, entitle him to relief. See Jones v. Wood, 114 F.3d 1002, 1010 (9th Cir. 1997). The district court analyzed the extensive record of petitioner's psychiatric treatment and behavior during the plea colloquy, and needed no further information to conclude that the state court's decision denying relief on the merits of this claim precluded habeas relief. See 28 U.S.C. § 2254(d); Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) (noting that an evidentiary hearing is not required when issues can be resolved by reference to the state court record).

Similarly, the district court did not err in failing to hold an evidentiary hearing on Hightower's claim that he was denied effective assistance of counsel because his counsel should have raised the issue of his competence. The record indicates that Hightower was competent to enter a plea and that his counsel investigated his psychiatric treatment by obtaining his medical records. Trial counsel's representation was therefore not unreasonable. See Strickland v. Washington, 466 U.S. 668, 688 (1984).

Hightower is foreclosed from challenging the use of his 1978 conviction to enhance his sentence because that conviction is no longer open to direct or

collateral attack in its own right. See Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001). Similarly, Hightower's challenge to his attorney's effectiveness based on the attorney's failure to raise this claim before the trial court fails. The petitioner is not entitled to challenge indirectly what Lackawanna prohibits his challenging directly.

Hightower's claim that his plea and the associated waivers of his constitutional rights were not knowing and voluntary under Boykin v. Alabama, 395 U.S. 238, 242 (1969), also fails. It was not unreasonable for the state court to conclude that no additional, separate waiver of rights was required before Hightower admitted his prior convictions.

The remaining claims on which the certificate of appealability was granted were not raised in Hightower's opening brief and are therefore waived. See Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 797 n.5 (9th Cir. 2001).

The district court properly denied Hightower's petition for habeas corpus.

AFFIRMED.